Supreme Court, U.S.
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No. 95-1002

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT F. HANNA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The FDIC concedes that the question presented is "one of considerable practical importance" and that the question "has divided the courts of appeals" (Br. in Opp. 7 n.4). In its attempt to dissuade this Court from reviewing a question that concededly "may merit this Court's review" (*ibid.*), however, the FDIC now denies that the court below actually *decided* the question whether the FDIC's breach of a contract to make severance payments results in "actual direct compensatory damages" under 12 U.S.C. § 1821(e)(3). Significantly, scarcely five months ago the FDIC whistled a different tune to the Ninth Circuit, in an unsuccessful effort to induce that court to rehear *en banc* one of the decisions (*Monrad* v. *FDIC*, 62 F.3d 1169 (1995)) with which the decision below squarely conflicts. Any reasoned examination of the Third Circuit's opinion makes clear that, notwithstanding the FDIC's opportunistic shift of position, the court below *did* decide the question presented by the petition. Further review is therefore entirely warranted.

1. The court below took pains to explain that its decision rested on the conclusion that, under Section 1821(e)(3), the petitioners are not entitled to "actual direct compensatory damages," regardless of the merits of their contractual claim for separation pay. The FDIC's contrary reading of the opinion (Br. in Opp. 6-11) is demonstrably wrong.

After it had discussed the "triggering" provisions of the severance pay contract, the court of appeals explained that it "would normally commit the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced." Pet. App. 18a. The court then declared, however: "*We do not do so here* because even if we were to assume a triggering event had occurred"—that is, even if the court were to resolve in petitioners' favor the issue it "would normally commit" to the district court—it "would nonetheless affirm the district court's grant of summary judg-

ment" on the grounds that the FDIC validly repudiated the severance obligation and did not owe damages for the repudiation. *Ibid.* (emphasis added).

Somehow, the FDIC divines in this language an "unequivocal[]" (Br. in Opp. 8) decision that no triggering event occurred. The plain English words will not bear that meaning. Rather, the court below should be taken at its word: but for its (erroneous) resolution of the question presented, the court of appeals would have remanded the "triggering" question for resolution, in the first instance, by the district court.

Significantly, in an effort to downplay the court of appeals' *explicit* reservation on the triggering issue, the FDIC omits to quote crucial language from the court's opinion. Thus, although the FDIC includes a block quotation from the opinion below (Br. in Opp. 11), it truncates the quotation, excising the court's statement that it "would normally" remand for a construction of the contract, but "d[id] not do so here" because it had determined the question presented adversely to the petitioners. A full and fair rendering of the opinion reveals that the court of appeals rested its decision on its resolution of the legal question presented.

2. This reading of the court of appeals' decision is confirmed by a crucial procedural aspect of the case, which the FDIC completely overlooks. In particular, although the trial court resolved the *Hennessy* petitioners' triggering claim—that there was a "reorganization" of Meritor giving rise to a separation pay claim—it never actually addressed the *Hanna* petitioners' triggering claim—specifically, that "job elimination" or "lack of work" gave rise to a claim under the Separation Plan. Instead, the trial court effectively pretermitted the latter issue by simply incorporating by reference its prior opinion in *Hennessy*—which, as noted, addressed only whether the termination of the Meritor employees resulted from a "reorganization." See Pet. App. 14a n.6,

43a, 54a. This is a significant gap in the trial court's decision, since if it had addressed those claims, it would likely, at the very least, have denied summary judgment.*

As the Third Circuit apparently recognized, for a court of appeals to decide the contract issue for itself under these circumstances—where the district court had not first decided the issue—would have been jurisprudentially indefensible. *Cf. Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986) (if the district court "failed to make findings of fact essential to a proper resolution of the legal question, [the court of appeals] should have remanded to the District Court to make those findings"). Thus, if the disposition of this appeal had truly turned on the contractual "triggering" issue, the Third Circuit would have had to remand the case—as it said it "normally" would—for the district court to hear "extrinsic evidence" before "construing [the] ambiguous contract terms." Pet. App. 18a.

But, as it made unmistakably clear, the Third Circuit did "not do so here." Pet. App. 18a. Instead, the Third Circuit decided the question presented in the petition explicitly in order to obviate the remand that, by the court's own admission, would otherwise have been "normal[]." In sum, the decision below rests squarely on the court's conclusion that,

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* The testimony of Christine Kramer (*Campbell* C.A. App. 362.1a)—the Meritor officer who drafted the Separation Plan—that she believed that the Plan covered employees who were terminated as the result of a regulatory closure or receivership created at least a triable issue of fact precluding summary judgment on the question whether the petitioners' benefits under the Plan were "triggered" by their terminations on December 11, 1992. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 112 (1989) (the terms of an ERISA plan must be construed in light of all the circumstances *and* any admissible evidence of the sponsor's intent). See also *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 182-183 (1959) (form contract should not be construed to include a term—here, an exclusion covering bank failure or receivership—that the drafter had omitted).

as a matter of law, the petitioners were not entitled to compensatory damages for the breach of the severance pay contract. That question is therefore presented for further review.

3. The FDIC's insistence that the court below did not actually decide the question presented is especially puzzling in light of the agency's representations to the Ninth Circuit in a rehearing petition in *Monrad*. In *that* case, the FDIC maintained that the "*decision*[ ] of the United States Court of Appeals for the * * * Third Circuit[ ]"—not mere dictum or surplusage in the opinion—conflicted with the disposition of the "actual direct compensatory damages" issue in *Monrad*. Petition for Rehearing With Suggestion for Rehearing *En Banc* of the FDIC, *Monrad* v. *FDIC*, No. 93-56221, at i (9th Cir. filed Sept. 21, 1995) (emphasis added) ("FDIC *Monrad* Petition").

In its *Monrad* petition, the FDIC nowhere suggested what it now maintains—that the Third Circuit's decision was at best an alternative holding, unnecessary to the judgment. To the contrary, the FDIC argued that the "Third Circuit[ ] had *held* that severance pay did not constitute 'actual direct compensatory damages.'" FDIC *Monrad* Petition 5 (emphasis added). The FDIC insisted that the Ninth Circuit's resolution of the compensatory damages issue conflicted with the "contrary holding[ ]" of the Third Circuit in this case (*id.* at 6), a holding that the FDIC proceeded to explicate (*id.* at 10-11). Finally, the FDIC asserted that the decision below established "the law" of the Third "[C]ircuit[ ]" with respect to the "important and recurring legal question" presented both in the petition in this case and in the FDIC's rehearing petition in *Monrad*. *Id.* at 15. The FDIC offers no explanation for its emphatic reliance in the Ninth Circuit on the precedential force of a passage in the decision below that, it now says, decided nothing.

The FDIC got it right in its *Monrad* petition. The decision below clearly turned on the resolution of the "actual direct compensatory damages" question. That question is of conceded importance and concededly has divided the courts of appeals. Further review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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